Danaharta Managers Sdn Bhd v Tsang & Ong Stockbrokers (Pte) Ltd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–2134 OF 2001
VINCENT NG J
19 APRIL 2004

Civil Procedure — Service — Out of jurisdiction — Served 'in accordance with the law of the country in which service is effected' — Service at registered address of defendant in Singapore — Whether good service — Allegation that service was not effected by plaintiff's process server — Whether defendant proved allegations — Rules of the High Court 1980 O 11 r 5(3)

The plaintiff had issued a writ notice ('encl 5') to be served out of jurisdiction on the defendant. The defendant's place of business and registered address was in Singapore. The plaintiff then filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng ('Chew'), a process server in Singapore. Chew averred that encl 5 was served by leaving a copy of the same at the defendant's registered address. The defendant applied to set aside encl 5 on the ground that the service of encl 5 on them was defective under the laws of Singapore. The defendant claimed they were served by a Malay man and not Chew, as maintained by the plaintiff. As there was no due and proper service of encl 5 in accordance with O 11 of the Rules of the High Court 1980 ('the RHC'), the defendant maintained that the judicial power of the court should not and could not be invoked in the Singapore. The senior assistant registrar dismissed their application to set aside the service of encl 5. The defendant appealed.

Held, dismissing the defendant's appeal with costs:

(1) The defendant did not deny that encl 5 was served on them at their registered address in Singapore. The notice of writ being so served, the plaintiff had complied with s 387 of Singapore Companies Act and therefore, the plaintiff had also complied with the stipulation in O 11 r 5(3) of the RHC that such notice has to be served 'in accordance with the law of the country in which service is effected' (see para 11).

(2) The burden of proof lies on the defendant to prove their allegations. Their failure to get their unidentified receptionist to affirm an affidavit as to what transpired at the time encl 5 was served at their registered office gave rise to an adverse inference against them (see para 12). When considering the entirety of Chew's testimony, the alleged discrepancies does not render the whole of his evidence unacceptable or make him an unreliable witness. Hence, the essence of his evidence that he was the person who had in fact effected the service remained intact and unimpaired (see para 14).

(3) The findings of the learned senior assistant registrar *vis-à-vis* the evidence given by Chew was a question of fact, and she found him to be a truthful witness and accepted his evidence that he was the process server who effected service of encl 5 on the defendant. Thus, the higher or appellate court should not interfere with the finding of fact by the decider who has had the opportunity to observe the witness, unless the decider has misdirected himself or herself on the facts or on the law or has taken extraneous or irrelevant matters into consideration on the finding of fact (see para 15).

[**Bahasa Malaysia summary**

Plaintif mengeluarkan satu notis writ ('lampiran 5') untuk diserahkan di luar bidang kuasa ke atas defendan. Tempat perniagaan dan alamat berdaftar defendan adalah di Singapura. Plaintif kemudiannya memfailkan satu afidavit penyampaian yang mengekshibitkan afidavit penyampaian seorang Chew Chin Heng ('Chew'), seorang penghantar saman di Singapura. Chew menyatakan bahawa lampiran 5 diserahkan dengan meninggalkan satu salinan notis writ tersebut di alamat berdaftar defendan. Defendan memohon untuk lampiran 5 diketepikan atas alasan yang bahawa serahan lampiran 5 ke atas mereka adalah cacat di bawah undang-undang Singapura. Defendan mendakwa bahawa lampiran 5 tersebut diserahkan oleh seorang lelaki Melayu dan bukannya Chew, sebagaimana yang dikatakan oleh plaintif. Oleh kerana serahan lampiran 5 tidak wajar dan betul serta tidak selaras dengan A 11 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), defendan mengatakan bahawa kuasa kehakiman mahkamah tidak patut dan tidak dapat digunakan di Singapura. Penolong kanan pendaftar menolak permohonan mereka untuk mengetepikan serahan lampiran 5. Defendan merayu.

Diputuskan, menolak rayuan defendan dengan kos:

(1) Defendan tidak menafikan yang lampiran 5 diserahkan ke atas mereka di alamat berdaftar mereka di Singapura. Notis writ seperti yang telah diserahkan, plaintif mematuhi s 387 Akta Syarikat Singapura dan oleh yang demikian, plaintif juga telah mematuhi peruntukan A 11 k 5(3) KMT bahawa notis tersebut hendaklah diserahkan 'mengikut undang-undang negara dimana serahan itu dibuat' (lihat perenggan 11).

(2) Beban bukti berada di pihak defendan untuk membuktikan dakwaan-dakwaan mereka. Kegagalan mereka untuk mendapat penyambut tetamu yang tidak dikenali itu mengikrarkan afidavit berhubung dengan apa yang berlaku pada masa lampiran 5 diserahkan di alamat berdaftar mereka memberi inferens yang negatif terhadap mereka (lihat perenggan 12). Apabila menimbang testimoni Chew secara keseluruhan, percanggahan-percanggahan yang dikatakan itu tidak menjadikan keseluruhan keterangannya tidak dapat diterima atau menjadikannya seorang saksi yang tidak boleh

diharap. Maka, intipati keterangannya yang beliau adalah orang yang sememangnya membuat serahan tersebut tetap teguh dan tidak goyah (lihat perenggan 14).

(3) Keputusan yang arif penolong kanan pendaftar iaitu berkenaan dengan keterangan yang diberikan oleh Chew adalah satu persoalan fakta, dan beliau telah mendapati yang Chew adalah seorang saksi yang boleh dipercayai dan telah menerima keterangannya bahawa beliaulah penghantar saman yang membuat serahan lampiran 5 tersebut ke atas defendan. Oleh yang demikian, mahkamah yang lebih tinggi atau mahkamah rayuan tidak patut mengganggu keputusan fakta yang dibuat oleh pemutus yang mempunyai peluang untuk memerhati saksi tersebut, melainkan jika pemutus telah tersalah arah dirinya pada fakta atau pada undang-undang atau telah mengambil kira perkara yang tidak relevan atau yang berlebihan dalam pertimbangannya semasa membuat keputusan fakta (lihat perenggan 15).]

Notes

For cases on service out of jurisdiction, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5270–5297.

For cases on service out of jurisdiction, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.2-071].

Legislation referred to

Companies Act [Sing] s 387
Court Rules 1997 [Sing] O 10 r 1(1)
Rules of the High Court 1980 O 11 rr 5(3), 6(2)

Ong Chee Kwang (Lewis Lim with him) (Lee Ong & Kandiah) for the appellant/defendant.
Amer Hamzah Arshad (SA Kok with him) (Zain & Co) for the respondent/plaintiff.

Vincent Ng J:

PREAMBLE

[1] Before me is the defendant's appeal (encl 36) against the decision of the learned Senior Assistant Registrar ('SAR') dated 5 September 2002, dismissing their application to set aside the service of the notice of writ for service out of the jurisdiction dated 26 April 2002.

BACKGROUND FACTS

[2] Before going on to consider the merits of the defendant's appeal, a review of the facts of this case would be useful.

[3] The plaintiff's claim against the defendant is for losses and miscellaneous share transaction charges amounting to RM55,020,772.89. On 18 February 2002, the plaintiff obtained leave of court to issue a writ notice of which is to be served out of jurisdiction and to serve the same out of jurisdiction. The notice of writ for service out of jurisdiction was filed on 26 April 2002 (encl 5). The defendant's place of business and registered address at the material time was No 80 Robinson Road #02–00 Singapore. The plaintiff then filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng ('Chew') (exh KSA1 encl 8), a process server in Singapore. Chew averred that encl 5 was served by leaving a copy of the same at the defendant's registered address at No 80 Robinson Road #02–00 Singapore on 5 August 2000 at 11am.

[4] On 2 September 2002, the defendant sought and obtained leave of court to file their conditional appearance and the application to set aside encl 5.

THE RULES PERTAINING TO SERVICE OUT OF JURISDICTION

[5] The defendant's application is premised on the sole ground that the service of encl 5 on them was defective under the laws of Singapore. As there was no due and proper service of encl 5 in accordance with O 11 of the Rules of the High Court 1980 ('the RHC'), the defendant maintains that the judicial power of this court should not and could not be invoked in Singapore.

[6] The application called for this court to examine the provisions relating to the service of a notice of writ outside jurisdiction in both Malaysia and Singapore.

[7] Order 11 r 5(3) RHC 1980 provides that:

> *A notice of writ which is to be served out of the jurisdiction* need not be served personally on the person required to be served so long as it *is served on him in accordance with the law of the country in which service is effected* (Emphasis added).

[8] Order 11 r 6(2) RHC 1980 reads:

> Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, *the notice may be served*:
>
> (a) …;
>
> (b) *except where service* through a consular authority or *by the plaintiff or his agent is prohibited by the law of the country*:
>
> (i) through a Malaysian Consular authority in that country; or
>
> (ii) *by the plaintiff or his agent* (Emphasis added).

[9] Order 10 r 1(1) of the Singapore Court Rules 1997 ('the SCR') states:

> Subject to the provisions of any written law and these Rules, a writ must be served personally on each defendant.

[10] And finally, s 387 of the Singapore Companies Act provides that:

> *A document may be served on a company by leaving it at* or sending it by registered post to *the registered office of the company* (Emphasis added).

THE SERVICE

[11] It is noteworthy that the defendant did not deny that encl 5 was served on them ('left at the registered office' in the words of their own counsel) at their registered address at No 80 Robinson Road #02–00 Singapore. The notice of writ being so served, I would hold that as the plaintiff had complied with s 387 of Singapore Companies Act the plaintiff had in turn also complied with the stipulation in our O 11 r 5(3) that such notice has to be served 'in accordance with the law of the country in which service is effected'. Their sole objection to the service of encl 5 is that it was served by a Malay man and not Chew, as maintained by the plaintiff. The plaintiff denied this averment. To ferret out the truth about the service of encl 5, the defendant obtained an order to cross-examine Chew.

[12] The defendant made heavy weather of Chew's failure to get the defendant's receptionist to acknowledge or endorse receipt of encl 5 by affixing the defendant's chop on his copy of encl 5. This, they alleged just went to show that Chew was not the person who effected service of encl 5. The plaintiff vehemently denied this allegation. It is trite law that the burden of proof lies on the defendant and their failure to get their unidentified receptionist to affirm an affidavit as to what transpired on 5 August 2000 at 11am at their registered office gives rise to an adverse inference against them.

[13] The defendant had also submitted that despite professing not knowing Bahasa Malaysia, Chew's ability to endorse particulars of the service in that language was suspect. I accept the plaintiff's simple explanation for Chew's 'sudden proficiency in Bahasa Malaysia'. Chew endorsed the particulars of the service in English and forwarded the same to the plaintiff's solicitors in Kuala Lumpur. The plaintiff's solicitors returned the document to Chew with a request for him to make a similar endorsement in Bahasa Malaysia, the translation of which was provided to him.

[14] I find that all the other alleged discrepancies the defendant found in Chew's testimony are trivial in nature. When considering the entirety of Chew's testimony, they do not render the whole of his evidence unacceptable or make him an unreliable witness. Hence, the essence of his evidence that he was the person who had in fact effected the service remain intact and unimpaired.

[15] The learned SAR who presided over the cross-examination of Chew had the benefit of seeing and observing the manner and demeanor in which he answered the questions put to him. The findings of the learned SAR vis-à-vis the evidence given by Chew is a question of fact, and she obviously found

him to be a truthful witness and accepted his evidence that he was the process server who effected service of encl 5 on the defendant. In my view, the same guiding principle that an appellate court applies when dealing with the question of veracity of a viva voce witness in the court below is equally applicable in the case of such witness who is cross-examined and re-examined before the SAR. The principle being that the higher or appellate court should not interfere with the finding of fact by the decider who has had the opportunity to observe the witness, unless the decider has misdirected himself or herself on the facts or on the law or has taken extraneous or irrelevant matters into consideration on the finding of fact. Having studied the recorded evidence in the light of this principle, I see no reason to interfere with her finding of fact.

CONCLUSION

[16] After careful consideration of the application, the affidavits and the submissions by both sides, I decided to dismiss the defendant's appeal in encl 36 with costs.

Defendant's appeal dismissed.

Reported by Loo Lai Mee